



COMPTROLLER GENERAL OF THE UNITED STATES
WASHINGTON, D.C. 20548

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B-177557

July 23, 1973

Collier, Shannon, Hill and Edwards
1625 Eye Street, NW.
Washington, D. C. 20006

Attention: Ronald Kolins, Esquire

Gentlemen:

By letter dated December 8, 1972, and subsequent correspondence, you protested on behalf of Comten, Incorporated, against Modification No. 2 to a contract between the General Services Administration and Tempo Computers, Incorporated. You contend that the modification constituted a contract award without regard to the applicable procedures relating to either advertised or negotiated procurements.

The General Services Administration (GSA) pursuant to request for proposals (RFP) No. 3-FP-B3-N-B0222, awarded a negotiated contract (No. GS-03S-38601) to Tempo Computers, Incorporated (Tempo) on July 17, 1972. The contract provided for the procurement of 11 Regional Communication Terminals (RCT) and 3 Message Center Communication Terminals (MCCT) for Message Switching Centers (MSC).

The contract was modified effective October 26, 1972, by Modification No. 2. This modification, in essence, provided for the procurement of additional RCTs for the United States Secret Service, Social Security Administration and the Veterans Administration.

Although GSA does not concede your argument concerning the validity of the modification, it contends that your protest is without merit in any event since the circumstances justified a sole-source award to Tempo under authority of 41 U.S.C. 252(c)(10), which authorizes negotiation where it is impracticable to secure competition.

In this connection, you contend that not only did the factual circumstances fail to justify dispensing with formal advertising procedures, but that the procurement was invalid because it did not comport with competitive negotiating procedures. With regard to the first point, you contend that specifications and descriptions of equipment were available for the Social Security system and thus it was not impracticable to secure competition by formal advertising. Without pursuing this point further, you assert that even if a

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negotiated procurement was justified, GSA failed to follow the appropriate procedural requirements. You point out that the applicable regulations require that proposals shall be solicited from the maximum number of qualified sources and that negotiated procurements shall be on a competitive basis to the maximum practical extent, citing section 1-3.101 of the Federal Procurement Regulations (FPR). You therefore contend that GSA abused its authority by negotiating the contract on a sole-source basis with Tempo since Comten and other firms are also capable of providing the equipment.

As noted above, GSA justifies its procurement action on the basis of 41 U.S.C. 252(c)(10), which authorizes the negotiation of purchases and contracts "for property or services for which it is impracticable to secure competition." Modification No. 2 cites the statute as authority for the procurement. Implementing the statute is section 1-3.210(a)(1) of the Federal Procurement Regulations, which provides as illustrative of one use of such authority: "When property or services can be obtained from only one person or firm (sole source of supply)." Furthermore, subparagraph (b) of that section provides that a contract negotiated pursuant thereto be supported by a Determination and Findings justifying the use of such authority.

The Determination and Findings prepared by the Director, Procurement Division, GSA, prior to execution of the subject modification to justify the use of negotiating authority reads:

In accordance with Section 307 of the Federal Property and Administrative Services Act of 1949, 63 Stat. 396, as amended (41 U.S.C. 257) and the authority delegated to me by GSA Order 3ADM P 5450.28, I hereby make the following findings:

The primary mission of the United States Secret Service is to provide protection of the President, the Vice President of the United States, and to Foreign Dignitaries, Foreign Missions, and to other persons designated by law.

The Secret Service in providing this protection has been operating with an outmoded, inadequate, dangerously slow communication system. Their present system does not have the capability to interface various data banks belonging to other law enforcement bodies including the National Crime Information Center, nor does it have the capability to address all point bulletins to their field offices.

Today's climate of increased political violence makes it mandatory that every advantage of modern technology be employed to provide adequate protection for these high ranking Government officials. The threat of violence is always present and the Secret Service is hampered by the present outmoded communication system. The ability of the Secret Service to deal with incidents of violence is being impacted with every day of delay in securing an adequate communications system.

The GSA has been advised by the Chief of Secret Service, by letter, that to accomplish the mission of their agency it is imperative that this project be expedited so that the system can become operational by January 1, 1973 or before the presidential inauguration.

Other urgent requirements for communications computers have originated for the Veterans Administration and Social Security Administration. The computers are required to replace present off-line magnetic tape terminals which have become saturated with new data traffic arising from extended coverage of Medicare, Social Security and Veterans Programs. The present systems consist of obsolete antiquated magnetic tape terminals that are approximately 12 years old and are not compatible with the equipments to be delivered under contract No. GS-03S-38601 (mini computers). A delay of these systems would create excessive hardships for the recipients of these agencies compensation checks. Replacement of these magnetic tape terminals with the mini computers will not require any change in the software being developed for the original mini computer configuration. Under the mini computer concept the Government will benefit greatly not only from operational and economic improvements but will achieve the flexibility and compatibility necessary to accomplish the mandate of providing superior communication services for the Federal Government.

The urgency of the above requirements dictates that the present contract No. GS-03S-38601 with Tempo Computers Inc., be amended to include five additional mini computers. The above contract was awarded on a competitive basis to the lowest responsive bidder. Tempo equipment was bench marked and performed in accordance with all specifications.

Amending the Tempo Contract is the only feasible way to meet the above requirements within the specified time frame.

Based upon the foregoing findings, I hereby determine that:

a. The proposed contract No. GS-03S-38601 be amended to include the additional hardware which is impracticable to secure competitively by formal advertising, and which is therefore, within the purview of section 302(c) (10) of the Federal Property and Administrative Services Act of 1949, as amended (41 U.S.C. 252(c)(10)).

b. In view of the foregoing, a contract for the above services may be negotiated with Tempo Computer Inc. by an authorized contracting officer of the Federal Supply Service, Region 3. [Underlining supplied.]

It can be seen from the Determination and Findings that in negotiating the modification to the subject contract GSA did not rely on the fact that specifications were not available for formal advertising. Rather, GSA based its determination to negotiate on a sole-source basis on the belief that only Tempo could supply the required equipment within the specified time frame. In this regard, GSA reports as follows:

While delivery requirements were definitely a basis for GSA's determination, they were not the only reasons advanced by GSA as justification for modifying the existing TEMPO contract. As previously discussed, the systems at issue were intended to interface with and be an integral part of the ARS (Advanced Records System). GSA had just recently canvassed the industry when the basic contract was awarded shortly before the issuance of Modification No. 2; it was felt that since TEMPO equipment furnished to GSA under the initial contract would be programmed to interface with ARS, a certain degree of systems compatibility would be derived from the acquisition of TEMPO equipment for USSS and SSA. Further, the TEMPO equipment installed under the initial award was successfully benchmarked in July, 1972. * * * Thus, there was some demonstrated assurance that the equipment designated in Modification No. 2 had the capability of satisfying the needs of USSS and SSA without causing a detrimental impact to their respective missions and programs. From a functional

basis, therefore, GSA was of the opinion that only TEMPO systems could meet the needs of both agencies within the given time frames without impairing their missions.

From the record, it appears that the equipment called for under Tempo's contract, as amended prior to the subject modification, was an integral part of GSA's change from "off line" to "on line" operations in connection with its Advanced Records System (ARS). When the Secret Service and the Social Security Administration came to GSA with their requirements in August 1972, the determination was made that with certain additional features the Tempo equipment called for under the contract would meet those requirements. Furthermore, it was determined that because of the similarity between the equipment called for under the contract, including certain expansion capabilities, and the equipment needed to meet the Secret Service and Social Security requirements, Tempo could furnish equipment which would not have to undergo possibly lengthy checkout procedures and would thereby be operational within the time frame required. While the add-on features and the "front ending" capability, in particular, for the Social Security equipment may be such as to make modification of the contract of doubtful propriety, we see no basis for disagreeing with GSA's position that in spite of these differences the successful benchmarking of the equipment under the contract resulted in Tempo being uniquely qualified to supply the additional equipment within the required time frame. Therefore, it is our view that this reason was a proper basis for use of the negotiation authority provided by 41 U.S.C. 252(c)(10), as implemented by FPR 1-3.210(a)(1). Accordingly, we cannot conclude that GSA's action was arbitrary.

You contend, however, that the urgency finding was erroneous and, therefore, the Determination and Findings is not valid. In this connection, you point out that the contract for software, without which the computers procured under Modification No. 2 are not functional, was not awarded until December 8, 1972, with a 120-day maximum delivery date. On this basis, you conclude that the computer procured pursuant to Modification No. 2 could not have been operational until at least April 1973 and, therefore, the hardware was not needed until that date.

You also contend that GSA's proffered justification for procuring the Social Security system based on urgent delivery requirements is refutable. You assert that the Social Security system is predicated on increased volumes of data traffic resulting from new social security legislation signed into law October 30, 1972. In this regard, you

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refer to a letter from Social Security dated November 7, 1972, wherein an accelerated installation schedule for its previously ordered equipment is requested. You point out, however, that Modification No. 2 bears an effective date of October 26, 1972, and precedes both the creation of the alleged urgency as well as Social Security's letter discussing its time requirements.

In connection with the Secret Service System, GSA reports that the Secret Service had planned to use the standard software supplied under another contract to meet Secret Service's requirements. Subsequent to Modification No. 2 of the contract, further evaluation indicated that modification of the standard software package would be necessary. Accordingly, on December 8, 1972, a contract for modified software was awarded. However, in order to maintain a minimum message switching capability it was decided that Secret Service could initially use the standard software in connection with the new equipment and replace it with the modified software on a phased basis as it was developed. Thus, at the time Modification No. 2 was negotiated, GSA apparently had every intention of meeting a January deadline. It was not until after execution of the modification that it was learned that modified software would be required.

We note in regard to the Social Security system that the Determination and Findings made by GSA does not rely on the November 7, 1972, letter from Social Security wherein it stated that its needs had become more urgent with the signing of new legislation. Rather, GSA relied on its understanding based upon conferences with cognizant people within the Social Security Administration prior to the date of the modification that there was an urgent requirement to replace present off-line magnetic tape terminals which had become saturated with new data traffic arising from extended coverage of medical, Social Security and Veteran's programs.

Finally, you have urged that we reject GSA's report as it was filed in this Office more than 20 days (23 days) after receipt by GSA of the complete statement of protest, contrary to our Interim Bid Protest Procedures and Standards, 4 CFR 20.5. As noted in the preamble to the regulations, GAO "has no authority either to impose time limits on contracting agencies for reports on protests or to regulate the withholding of award." While we believe that the contracting agencies should make reasonable efforts to meet the bid protest time limits, we do not think it would be appropriate to grant your request.

In accordance with the foregoing, your protest is denied.

Sincerely yours,

E. H. Morse, Jr.

For the Comptroller General
of the United States